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No. 90-6531

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

KEITH J. HUDSON,

Petitioner,

v.

JACK McMILLIAN, MARVIN WOODS AND ARTHUR MEZO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE THE D.C. PRISONERS' LEGAL SERVICES PROJECT, INC., IN SUPPORT OF PETITIONER

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STATEMENT OF CONSENT AND INTEREST OF THE AMICUS CURIAE

The parties to this proceeding, by their respective counsel of record, have consented to the filing of this Brief.

The D.C. Prisoners' Legal Services Project, Inc. ("the Project"), a non-profit organization established in 1986, provides legal representation to indigent prisoners in the District of Columbia Correctional System with respect to confinement and non-confinement related civil matters. It gives priority to cases that raise substantial health and safety concerns, as well as cases that raise issues relating to prisoners' access to the courts.

The Project's participation as an amicus curiae in this case is based upon its substantial and concrete interest in the rejection of the standard adopted by the court below. Many prominent legal

advocacy organizations concerned with prisoners' issues are, in most instances, involved in seeking broad declaratory or injunctive relief on behalf of classes of prisoners on institution-wide or systemwide bases. Although such litigation constitutes a portion of the Project's caseload, the Project, as distinguished from other organizations, also represents individual prisoners in their prosecution of claims for damages premised upon violations of their constitutional rights under the First, Fifth and Eighth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983.

One such case, currently pending, is Edward L. Bellamy, et al. v. District of Columbia, et al., C.A. No. 90-2283 (D.D.C.) (Bryant, Sr. J.) ("the Bellamy case"), wherein several current and former inmates of the District of

Columbia Detention Facility ("D.C. Jail"), seek declaratory relief and damages under Section 1983, alleging that they were the victims of a series of unprovoked and unjustified beatings and macings by correctional officers acting under color of District of Columbia law. Two of the plaintiffs in the Bellamy case allege permanent disabilities as a result of the physical abuses inflicted upon them, while the remaining plaintiffs allege no permanent injury. The alleged wanton and malicious conduct of the correctional officers is essentially identical in each instance.

Applying the Fifth Circuit's "significant injury" standard, the district court in the Bellamy case might well be required to hold that the plaintiffs alleging permanent disability as a result of defendants' excessive force have stated Eighth Amendment claims

for which relief can be granted under Section 1983, while the other plaintiffs' claims must be dismissed, notwithstanding the allegations of all plaintiffs that they were subjected to the same course of brutal treatment. The patent anomaly of such a result demonstrates the illogical and unworkable nature of an Eighth Amendment standard which assesses the "cruel and unusual" character of punishment by focusing on the effect of that punishment, rather than on the intent of the unlawful actor(s).

The Project's amicus participation herein is motivated by its clear interest -- as a legal advocate for the Bellamy plaintiffs and for District of Columbia prisoners generally -- in seeing this Court act, in accordance with its own overwhelming past precedent, to reject the Fifth Circuit's ill-founded "significant injury" threshold standard

for Eighth Amendment claims, thus confirming prisoners' access to a federal forum within which to vindicate their federal constitutional rights when they have been subjected to willful, wanton excessive force during incarceration.

SUMMARY OF ARGUMENT

The placement of a "significant injury" barrier at the front door of each federal district court, impeding the access of prisoners subjected to unjustified physical abuses who would seek vindication of their Eighth Amendment rights pursuant to actions brought under 42 U.S.C. § 1983, constitutes an act of judicial fiat which cannot withstand reasoned analysis. The requirement is without foundation in controlling law or logic, and must be overturned.

First, the methodology employed by the Fifth Circuit in fashioning its four-part mandatory standard (including "significant injury") for assessing the viability of an Eighth Amendment claim was hopelessly flawed from the outset. This Court's precedents -- including cases the Fifth Circuit purports to have followed -- demonstrate the clear error in that court's attempt to engraft distinct modes of Fourth and Eighth Amendment analysis into a single device obviously intended to promote the summary rejection of most prisoners' claims.

Second, the substantive standard yielded by the Fifth Circuit's flawed methodology is itself irreconciliable with this Court's various articulations concerning the character or quality of state conduct directed toward incarcerated individuals that will be found violative of the Eighth Amendment

prohibition against "cruel and unusual" punishment.

Finally, even if these legal defects were not alone sufficient to require reversal of the decision below, it is apparent that from a purely practical perspective, the Fifth Circuit's "significant injury" threshold standard is devoid of merit. Although purportedly susceptible of application on an "objective" basis, the standard's inherently subjective character renders it unsuitable for the purpose it is apparently intended to serve.

ARGUMENT

In Whitley v. Albers, 475 U.S. 312 (1986), this Court addressed the analytical factors governing the adjudication of "cruel and unusual" punishment claims for "excessive force" under the Eighth Amendment brought pursuant to 42 U.S.C. § 1983. This Court

expressly stated in Whitley that the "extent of injury inflicted" was but one of several relevant factors to be considered in this context. Id. at 321. The current rule in the Fifth Circuit that prisoners asserting Eighth Amendment excessive force claims under Section 1983 must allege and demonstrate the capability of proving that they suffered a "significant injury" as an isolated threshold requirement, cannot withstand scrutiny under Whitley or this Court's other relevant precedents.

I. PROOF OF A "SIGNIFICANT INJURY" IS NOT A PREREQUISITE TO AN EIGHTH AMENDMENT CLAIM

In the proceedings below, the Fifth Circuit accepted the findings of fact reached by a federal magistrate, after a full trial on the merits, regarding the "clearly excessive and . . . unnecessary and wanton infliction of pain," by respondents against petitioner. Joint

Appendix ("J.A.") 32. However, the court below reversed the decision in favor of petitioner on the ground that his resulting injuries were not "significant". J.A. 33. According to the court, petitioner failed to prove that he had been a victim of cruel and unusual punishment because he was not injured badly enough by the beating. Id.

This decision was grounded in recent Fifth Circuit cases requiring plaintiffs who bring Eighth Amendment "excessive force" claims to prove that they have suffered "significant injury". But the presence of the "significant injury" requirement in the Fifth Circuit's Eighth Amendment jurisprudence can be traced to an unfortunate methodological misstep, whereby the Fifth Circuit swept all of its previously articulated Fourth Amendment standards into an Eighth

Amendment case. This was done despite the teaching of this Court in Graham v. Connor, 490 U.S. 386 (1989), that Fourth and Eighth Amendment standards are distinct in concept and application. Indeed, when this Court's Eighth Amendment decisions are canvassed, the conclusion is inescapable that no "significant" injury need be shown.

A. The Fifth Circuit Improperly Integrated Fourth And Eighth Amendment Standards

In Huquet v. Barnett, 900 F.2d 838 (5th Cir. 1990), the Fifth Circuit adopted the standard it currently applies to Eighth Amendment "excessive force" claims. The Huquet decision, in turn, rested upon Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (en banc).

In Johnson v. Morel, the Fifth Circuit developed its current standards for assessing claims of excessive force brought under the Fourth Amendment. A

divided panel of the Fifth Circuit held that "severe injury" is "a necessary element of a § 1983 civil rights action complaining of the use of undue force." 843 F.2d 846, 847 (5th Cir. 1988). On rehearing of the case, en banc, the court held, in a per curiam opinion, that "a significant injury" was one of three required elements to be alleged and proven by a plaintiff in order to "prevail on a Constitutional excess force claim[.]" 876 F.2d at 480 (footnote omitted).

The decision gave no clue as to the source of the "significant injury" requirement. Nor did it illuminate the difference between the "severe injury" standard endorsed by the panel and "significant injury". As to the meaning of the new standard, the court stated only that:

> We think it unlikely that such a significant injury will be caused by unnecessary force without significant physical injury. However, on the facts before us here, we do not decide whether a significant but non-physical injury would be legally significant.

Id. at 480 n.1 (emphasis in original).

Seven of sixteen judges dissented from the holding that a significant injury is a prerequisite to a Fourth Amendment claim. In their view, Fourth Amendment "protection is not limited to physical injuries but extends to all damage inflicted. . . ." Id. at 481. (Rubin, J., concurring in part and concurring in judgment). The dissenters also pointed out that this Court, in Graham v. Connor, had the opportunity to adopt a severe injury requirement, and noted that "[a]lthough the Court did not rule on the question explicitly, its opinion surely contains no quantum-of-injury criterion." Id.

While Johnson v. Morel was a Fourth Amendment case, it has been transposed into the Fifth Circuit's Eighth Amendment jurisprudence. In Huquet, a panel of the Fifth Circuit, relying on Johnson, adopted a mandatory four-part test for determining the sufficiency of a prisoner's Eighth Amendment excess force claim, including the "significant injury" element, and stated that "[i]f any one of these elements fails, so too does the plaintiff's claim." Id. at 841. The panel observed that this Court has described cruel and unusual punishment as conduct which involves the "unnecessary and wanton infliction of pain." See, e.g., Whitley v. Albers, 475 U.S. at 319. Thus, because Huquet involved an Eighth Amendment excessive force claim, the panel took the three required Johnson elements for Fourth Amendment claims and, adding the requirement that the alleged

state action must constitute the unnecessary and wanton infliction of pain, applied them to Eighth Amendment claims.

Viewed from the perspective of this Court's constitutional jurisprudence, the Huquet requirements are a patchwork of three disparate components which, combined, reflect a radically restrictive standard. In effect, Huquet holds that any claim of an Eighth Amendment violation must (1) meet the requirements imposed by Graham v. Connor for a violation of the Fourth Amendment (as construed in Johnson v. Morel), (2) meet the requirements imposed by Whitley v. Albers for an Eighth Amendment claim, and (3) meet the additional requirement of a "significant injury".

The importation of Fourth Amendment standards into the Eighth Amendment realm is fundamentally at odds with existing

precedent. In Graham v. Connor, this court emphasized that Fourth Amendment and Eighth Amendment claims are judged by different standards. It held:

> In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard.

490 U.S. at 394 (emphasis added; citations and footnote omitted). This Court also shed light on the essential difference between Fourth Amendment and Eighth Amendment claims. While subjective intent is irrelevant in Fourth

Amendment cases, it is determinative in cases brought under the Eighth Amendment. The Court stated in Graham with respect to the Fourth Amendment that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Id. at 397 (citations omitted). By way of contrast, the Court discussed the standards developed in Whitley v. Albers governing excessive force claims brought under the Eighth Amendment: "[W]hen prison officials use physical force against an inmate to restore order in the face of a prison disturbance, the question whether the measure taken inflicted unnecessary and wanton pain ultimately turns on whether the force was applied in a good faith effort to maintain or restore

discipline or maliciously and sadistically for the very purpose of causing harm." Graham, 490 U.S. at 398-99 n.11 (emphasis added; citations, internal quotations and ellipses omitted).

Graham unambiguously confirms that while Fourth Amendment analysis is governed by the "objective reasonableness" standard, claims under the Eighth Amendment are to be evaluated by looking at the subjective mental state of the prison officer. Id. at 399. In Huguet, the Fifth Circuit was purportedly "[g]uided by [this Court's] decision in Graham v. Connor[.]" 900 F.2d at 839. Yet, Huguet simply ignores the admonition in Graham that the analytical standards relevant to these two amendments are distinct, and inexplicably engrafts the two tests together for application to Eighth Amendment claims, thus accomplishing the very "generic"

treatment of excessive force claims that this Court specifically rejected. Graham, 490 U.S. at 393. In the words of Justice Cardozo, "[w]hen things are called by the same name, it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning." Lowden v. Northwestern National Bank, 298 U.S. 160, 165 (1936). This Court's decision in Graham makes clear that the "assumption" of the Huquet panel -- i.e., that excessive force claims, irrespective of their different constitutional underpinnings, may all be treated the same -- was in error.

B. The Fifth Circuit's Standard Is Inconsistent With This Court's Eighth Amendment Decisions

Convicted criminals surrender many of their civil rights at the jailhouse door. They are compelled by state law to submit themselves to whatever treatment

the state and its employees provide, protected only by the requirement that they not be subjected to "cruel and unusual punishment." U.S. Const., amend. VIII. This Court has held that the Eighth Amendment prohibits conduct which involves "the unnecessary and wanton infliction of pain." Wilson v. Seiter, ___ U.S. ___, 59 U.S.L.W. 4671 (June 17, 1991); Whitley v. Albers, 475 at 319; Ingraham v. Wright, 430 U.S. 651, 670 (1977): Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). It prohibits conduct that is "incompatible with the evolving standards of decency that mark the progress of a maturing society." Estelle, 429 U.S. at 102, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). And, the Eighth Amendment prohibits punishment

that has no "legitimate penological justification." Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (citations omitted). By any of these measures, the right of an inmate to be free from cruel and unusual punishment is violated when he is placed in restraints and then maliciously beaten by corrections officers, as was petitioner in the case at bar. Whether the victim has suffered physical injuries that a court can characterize as "significant" (or "severe" for that matter) is, at most, but one of several relevant considerations for purposes of the Eighth Amendment.

1. Whether Conduct Constitutes An "Unnecessary And Wanton Infliction Of Pain" Does Not Depend On The Extent Of The Injury

This Court has repeatedly held that the "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment. See cases cited supra. In

order to determine whether a use of force constitutes the unnecessary and wanton infliction of pain, the proper focus is on the mental state of the party responsible for the use of force. Whitley, 475 U.S. at 321. In Wilson v. Seiter, this court recently reaffirmed that its Eighth Amendment jurisprudence "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." 59 U.S.L.W. at 4672 (footnote omitted). Lower courts have been instructed to consider various factors in order to distinguish cases where corrections officers could have thought that the use of force was necessary, from those cases where their conduct amounted to a "knowing willingness that [harm] occur." Whitley, 475 U.S. at 321. These factors include "'such factors as the need for

the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted[.]'" Id. (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), cert. denied, 414 U.S. 1033 (1973)). Far from holding that any one factor is an absolute requirement for a finding of unnecessary and wanton infliction of pain, this Court has directed lower courts to consider all of these factors as an aid in making the "ultimate determination" regarding the prison official's state of mind. Id. Indeed, as a panel of the Court of Appeals for the Fourth Circuit stated recently, while extent of injury may be an important factor in excessive force cases, "that factor only comes into play when the nature of the force must be balanced against the proffered justification for

its application." Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991).

The Fifth Circuit's independent "significant injury" requirement finds no support in the decisions of this Court and has been repeatedly disavowed by other circuits.[1/] Such a requirement

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1/ See, e.g., Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988) ("Even if the injuries suffered were not permanent or severe, a plaintiff may still recover if the force used was unreasonable and excessive.") (Citations and internal quotations omitted.)); Gray v. Spillman, 925 F.2d at 91, 94 (serious injury is not an essential element of a § 1983 action when the claim is predicated on being beaten and threatened during custodial interrogation); McHenry v. Chadwick, 896 F.2d 184, 187 (6th Cir. 1990) ("[I]n this Circuit, a prisoner alleging an eighth amendment violation need not prove that he suffered a serious physical injury, rather he must demonstrate that the infliction of pain was unnecessary and wanton."); Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987) (Regular banging on bars by guards merely to harass inmates makes out a claim for constitutional

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has the prospect of lending the imprimatur of the Eighth Amendment to intentional and possibly even systematic brutality on the part of corrections officers against prisoners. Repeated non-severe beatings, use of electric

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violation.); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) ("[T]he day has passed when an inmate must show a court the scars of torture in order to make out a complaint under § 1983."); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.) (discussed infra); Sampley v. Ruettgers, 704 F.2d 491, 495 (10th Cir. 1983) (The "unnecessary and wanton infliction of pain" imposes the following three requirements: "First, 'wanton' requires that the guard have intended to harm the inmate. Second, 'unnecessary' requires the force used to have been more than appeared reasonably necessary at the time of the use of force to maintain or restore discipline. Third, 'pain' means more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury." (Footnote omitted.)); Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the eighth amendment simply because the pain produced is only momentary.").

prods, chemical agents, threats with weapons, and other forms of abuse could be free from constitutional scrutiny, so long as no serious physical trauma or lasting physical injury resulted.

The notion that a particular degree of injury, viewed in isolation, is the linchpin of a viable Eighth Amendment claim has long been rejected. In Robinson v. California, 370 U.S. 660 (1962), this Court held that a statute making it a crime to be addicted to narcotics violated the prohibition against cruel and unusual punishment. It specifically addressed the issue of how to consider the effect of the punishment on the claimant, stating:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be viewed in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Id. at 667 (emphasis added). Justice Douglas, in concurrence, added that a prosecution and conviction for addiction is cruel and unusual punishment because of the "resulting stigma and irreparable damage to the good name of the accused." Id. at 676-77 (Douglas, J., concurring).

In Furman v. Georgia, 408 U.S. 238 (1972), Justice Brennan discussed further the quantum of injury necessary for an Eighth Amendment claim:

> Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. Yet the Framers also knew that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. Even though there may be involved no physical mistreatment, no primitive torture, severe mental pain may be inherent in the infliction of a particular punishment.

Id. at 271 (Brennan, J., concurring) (emphasis added; citations, footnotes and internal quotations omitted).

In Trop v. Dulles, 356 U.S. 86 (1958), this Court invalidated a punishment that did not involve even the possibility of significant physical injury. The court held that "use of denationalization as a punishment is barred by the Eighth Amendment[,]" despite the fact that "[t]here may be involved no physical mistreatment, no primitive torture." Id. at 101. The Court held that this punishment "subjects the individual to a fate of ever-increasing fear and distress." Id. at 102. Indeed, the court in Trop v. Dulles did not require proof of adverse consequences. Rather, merely "the threat" of such consequences made the punishment unconstitutional. Id.

As early as 1910, this Court invalidated a punishment without requiring a showing of "significant

injury." In Weems v. United States, 217 U.S. 349 (1910), this Court held that a sentence of cadena temporal for making a false entry in a public document violated the Eighth Amendment. There were allegations that the plaintiff in error would be forced to suffer the chaining of his appendages, but allegations of significant physical injury were clearly absent.

Each of these cases establishes that there has never been a constitutional requirement of a particular degree of physical injury for any Eighth Amendment claim. Indeed, as recently as a few weeks ago in Wilson v. Seiter, this Court implicitly rejected the suggestion that there is some required minimum threshold of physical injury when it rejected the respondents' argument that the Eighth Amendment requires a higher level of culpability in cases which do not involve

allegations of physical injury. See Wilson, 59 U.S.L.W. at 4673.

In other contexts as well, this Court has refused to impose a requirement of actual injury in order to vindicate a claim that constitutional rights have been violated. See Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (given constitutional violation, proof of actual injury not required for due process claim to be actionable under § 1983; nominal damages can be awarded); Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) (an award of nominal damages under § 1983 is the appropriate way to vindicate constitutional rights where deprivation thereof has not caused actual injury). Indeed, this Court has expressly held that compensatory damages may be awarded under Section 1983, even in the absence

of physical injury. See Stachura, 477 U.S. at 307 (compensatory damages under § 1983 may be based on injuries such as "personal humiliation, and mental anguish and suffering").

Moreover, the idea that a particular level of injury is a separate and requisite element of an Eighth Amendment claim runs counter to this Court's endorsement of the balancing test articulated by the Second Circuit in Johnson v. Glick, a case cited with approval by this Court on more than one occasion. See Wilson, 59 U.S.L.W. at 4672; Whitley, 475 U.S. at 320-21. Johnson v. Glick and Whitley teach that one factor from which the mental state of a prison officer can be inferred is the amount of harm inflicted. The Fifth Circuit's "significant injury" requirement, when applied as an absolute threshold standard, effectively

disembowels the balancing approach established in Johnson v. Glick and embraced by this Court in Whitley.

To be sure, some use of force by corrections officers is permissible. As Judge Friendly noted in Johnson v. Glick, the role of the corrections officer is inherently coercive, and the observation that "[n]ot every push or shove" by a corrections officer rises to the level of a constitutional violation remains unassailable. 481 F.2d at 1033. However, as Judge Friendly recognized and this Court has held, when force which would otherwise be proper is imposed "maliciously and sadistically" it amounts to the cruel and unusual punishment which the Eighth Amendment proscribes. Whitley, 475 U.S. at 320-21.

As this Court made clear in Estelle, the line dividing ordinary torts from constitutional violation is not drawn

along the axis of injury; rather, it is the intent of the actor charged with the constitutional wrong which is determinative:

> In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

429 U.S. at 106.

The analysis is the same in excessive force cases. According to Wilson, "[t]he infliction of punishment is a deliberate act intended to chastise or deter." 59 U.S.L.W. at 4672 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.), cert. denied, 479 U.S. 816 (1986) (emphasis added)). The essential distinction between Eighth Amendment claims and ordinary torts is the intent of the prison guard. "[I]f [a] guard accidentally stepped on [a]

prisoner's toe and broke it, this would not be punishment . . . ." Id. Clearly implicit is the converse principle -- i.e., that if a guard intentionally and maliciously stomped on a prisoner's toe, intending to crush it, his conduct would violate the Eighth Amendment. Under this Court's analytical standards, whether the prisoner's toe was, in fact, broken as a result of the guard's action would be of no independent constitutional consequence.

2. Whether There Is A "Legitimate Penological Justification" For Conduct Does Not Depend On The Extent Of The Injury

This Court has included among prohibited punishments those that are "totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (citing Gregg v. Georgia 428 U.S. 153, 183 (1976) (plurality opinion)); Weems v. United States, 217 U.S. 349 (1910). Describing

the Estelle decision, Justice Powell, writing for the court in Rhodes, stated:

> In Estelle v. Gamble, . . . we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose.

452 U.S. at 347 (citation omitted).

Two seminal decisions by the Court of Appeals have concluded that the beating of inmates serves no legitimate penological purpose. In Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 23 (2d Cir. 1971), the court recognized that "[c]orporal punishment of prisoners has been disapproved of by penologists except where necessary to protect one's self or others from injury, or to prevent escape, or serious injury to property." (Citations and internal quotations omitted.)

Justice (then Judge) Blackmun, writing for the Court of Appeals for the Eighth Circuit, held that the use of the strap on prisoners is punishment that is cruel and unusual. He wrote:

> Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates and from their keepers.

Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968).

Indeed, in Hutto v. Finney, 437 U.S. 678 (1978), this Court's opinion cited beatings of prisoners as a clear example of unconstitutional punishment. Id. at 682 n.4 (lashing of prisoners with leather strap). What was said with respect to whipping with the strap is equally true of a beating administered with fists and booted feet. When an

inmate's hands are shackled to his waist, he is unable to raise his hands to protect himself. When his feet are shackled together, he is hobbled and cannot easily escape. No legitimate penological purpose is served by beating an inmate who has been rendered helpless and defenseless. That conclusion does not depend on the extent of the resulting injury.

3. Whether Conduct Is "Incompatible With The Evolving Standards Of Decency" Does Not Depend On The Extent Of The Injury

The Eighth Amendment prohibits punishment that "[is] incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)). To determine contemporary standards of decency, the

Court in Estelle looked to modern legislation. Id. at 103 n.8.

The Model Sentencing and Corrections Act requires the director of corrections to "adopt rules limiting the use of physical force by employees to those situations in which physical force is believed to be reasonably necessary to protect the safety of the public or security or safety within a facility." Model Sentencing and Corrections Act (U.L.A.) § 4-104(b)(2). See also American Correctional Association, Standards for Adult Local Detention Facilities, § 2-5198 (2d ed. 1987).

These standards reflect a general societal consensus that the unnecessary use of force by prison guards is incompatible with modern standards of decency. Certainly, the beating of a prisoner who is in full restraints offends common sense notions of decency.

The suggestion that society's views with regard to such conduct would vary depending on the severity of the injury suffered by the prisoner as a result of such a beating defies logic and experience.

II. AS A MATTER OF POLICY, THE FIFTH CIRCUIT STANDARD FAILS TO SERVE ITS INTENDED PURPOSES

The Fifth Circuit's adoption, in Huquet, of an all-inclusive four-element threshold test against which to measure the sufficiency of prisoners' Eighth Amendment excessive force claims is only the most recent manifestation of that court's campaign to facilitate prompt dismissal of broad categories of pro se complaints it deems unmeritorious. Under Huquet, the Fifth Circuit intends that any excessive force claim that is determined, at the outset, to be deficient in its allegations as to any of the four Huquet elements -- including

"significant injury" -- will be deemed "frivolous" and dismissed forthwith under Section 1915(d). See Huquet v. Barnett, 900 F.2d at 841-42; see also Wesson v. Oglesby, 910 F.2d 278, 282-83 (5th Cir. 1990) (affirming dismissal, pursuant to Section 1915(d), of excessive force claim as having "no arguable merit" due to failure of prisoners' allegations to satisfy Huquet standards).[2/]

2/ 28 U.S.C. § 1915 permits a private litigant to commence an action in federal court in forma pauperis ("IFP"), if he is unable to afford the costs of litigation, as demonstrated by affidavit. However, Section 1915(d) expressly provides that "[t]he court may . . . dismiss the case if the allegation of poverty is untrue, or if satisfied that the case is frivolous or malicious." (Emphasis added.) Under the procedure employed in the Fifth Circuit, if a federal magistrate, after a hearing, determines that the pro se indigent prisoner's Section 1983 claim is "frivolous or malicious", the Magistrate may recommend revocation of IFP status and dismissal of the complaint. See Green v. McKaskle, 788 F.2d 1116, 1119 (5th Cir. 1986); Spears v. McCotter, 766 F.2d 179, 182 (5th Cir. 1985).

Recent decisions of this Court expressly approve the judicious use of some mechanisms by which federal district courts can deal with the burdens on their caseloads resulting from pro se filings. See, e.g., McCarthy v. Bronson, ___ U.S. ___, 111 S. Ct. 1737, 1741-42 (1991) (endorsing district courts' referral to magistrates under, 28 U.S.C. § 636(b)(1)(B), of prisoners' Section 1983 "conditions of confinement" claims); Neitzke v. Williams, 490 U.S. 319 (1989) (approving summary dismissal of certain types of in forma pauperis actions pursuant to Section 1915(d) "to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits"). What this Court has not approved, however, is the adoption and imposition of novel substantive legal standards as a device to facilitate dismissal of pro se claims at a threshold

stage, based upon their characterization as "frivolous". Yet, that is precisely the path upon which the Fifth Circuit has embarked.

In Neitzke, Justice Marshall, writing on behalf of a unanimous Court, stated that:

> [A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, § 1915(d)'s term "frivolous," . . . embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.

490 U.S. at 325-26 (emphasis added; footnote omitted). The requirement that an Eighth Amendment excessive force claimant must allege, and show the ability at the outset of litigation to prove, "significant injury" in order to be entitled to his day in court is hardly the type of "inarguable legal conclusion" contemplated by this Court. As shown

hereinabove -- see supra at 23 n.1 -- many courts flatly reject that view. To categorically define claims failing to meet the "significant injury" standard as "frivolous", as does the Fifth Circuit, "is to distort measurably the meaning of frivolousness both in common and legal parlance." Id. at 328-29.

Accordingly, even assuming the general propriety of efforts to summarily dispose of truly unmeritorious pro se prisoners' complaints, it is nevertheless clear that this Court has never suggested that substantive legal elements may be interposed in such a way as to prevent most cases from reaching even the first stages of truly adversarial proceedings. See Neitzke, 490 U.S. at 329-30 (plaintiffs with "arguable claim[s]" are entitled to the procedural protections attendant to Rule 12(b)(6) motions practice, which are absent from the "sua

sponte dismissals permitted by and frequently employed under § 1915(d)"). This critical conceptual flaw in the Fifth Circuit's newest device for exercising control over its courts' pro se docket is only compounded by the considerable problems of practical application revealed by that court's short-lived experience with implementation of the "significant injury" standard.

Even cursory analysis of the recent cases in which the Fifth Circuit has attempted to apply the "significant injury" standard reveals the myriad problems its employment presents. One such problem is the court's apparent difficulty in defining what the applicable standard actually is. Illustrative of this difficulty are the decisions in Adams v. Hansen, 906 F.2d 192 (5th Cir. 1990), Wesson v. Oglesby,

910 F.2d 278 (5th Cir. 1990), and Oliver v. Collins, 914 F.2d 56 (5th Cir. 1990). In Adams, the court reviewed dismissal of an Eighth Amendment excessive force claim, based on the district judge's finding that the claimant had not suffered any "severe" injury.[3/] 906 F.2d at 193. The Court considered whether the "severe injury" standard applied by the district court was the functional equivalent of the "significant

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3/ This district court decision was rendered prior to the Fifth Circuit's adoption of a mandatory "significant injury" requirement in Huquet, supra, and the "severe" injury standard was taken from Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981), a police brutality case arising under the Fourteenth Amendment. The Shillingford decision did not define the term "severe" for these purposes, and it certainly did not suggest that the presence or absence of "severe injury", taken alone, would be dispositive as to whether a Section 1983 claim should be dismissed or permitted to proceed to full litigation on the merits. See Johnson v. Morel, 843 F.2d at 848-49 (Thornberry, J., dissenting).

injury" standard imposed by the intervening decision in Huquet, and held that the two standards were the same. Id. at 194. However, in the Wesson case, decided less than two months later by a different panel, the court, also addressing a district court's dismissal of an Eighth Amendment claim based on a pre-Huquet "severe injury" analysis, implied that the two standards were not the same. See 910 F.2d at 283 n.4 (referring to "severe injury" standard as "at least as demanding as the Huquet 'significant injury' standard"). A mere two weeks later, the same panel that decided Wesson again confronted the "severe"/"significant" dichotomy in Oliver v. Collins, and reached yet another conclusion. See 914 F.2d at 59 ("[G]iven the history of . . . Huquet, we must regard 'significant' as different from, and imposing in at least some

respects a less stringent standard than, 'severe.'"); see also id. at 59 n.1 (characterizing the court's statement in Adams v. Hansen to effect that "severe injury" and "significant injury" are the same (which the Court in Adams had described as its holding) as "essentially dicta").

The court's uncertainty as to what the applicable standard is, is compounded by its apparent inability to determine what the standard means, in application. While Huquet unequivocally represents "significant injury" as an objective standard, see 900 F.2d at 841, subsequent Fifth Circuit decisions reveal the court to be utterly incapable of applying it in that way. The court's judges do not even purport to be able to articulate the standard's meaning in an objective fashion. See, e.g., Wesson, 910 F.2d at 283 ("What quantum of harm constitutes 'significant injury' under the eighth

amendment? We need not embark on this nebulous inquiry . . . .").

Instead, the court has sought guidance in Johnson v. Morel, the Fourth Amendment case from which the Huquet "significant injury" standard was derived. The alleged injuries in Johnson, which were found sufficiently "significant" by the en banc court to require reversal of a summary judgment against the claimant, are now used as a baseline standard for purposes of Eighth Amendment scrutiny. See, e.g., Adams v. Hansen:

> The "significant injury" factor is taken directly from Johnson v. Morel, 876 F.2d at 479-80; and we look to that opinion for guidance. The actionable injury in Johnson was: "Morel applied the handcuffs so tightly that they not only broke the skin, but left apparently permanent scars on Johnson's wrists . . . ." 876 F.2d at 478. In light of Johnson, as adopted by Huquet, Adams's injuries -- lacerated fingers

> requiring sutures -- are of sufficient magnitude to invoke Eighth Amendment protection.

906 F.2d at 193-94 (footnote omitted); see also Williams v. Luna, 909 F.2d 121, 124 (5th Cir. 1990) (by comparison to Johnson injuries, plaintiff's allegations of "headaches, back pain, and muscle control problems in both legs" resulting from unprovoked beating by prison guards met "significant injury" standard); Oliver v. Collins, 914 F.2d at 59-60 & n.1 (allegations of headaches, backache and irregular heartbeat due to beating by prison guards sufficient to meet Johnson/ Huquet standard). Yet even in this context, the court has been inconsistent in its analytical approach. In a short one-paragraph decision affirming dismissal in Wise v. Carlson, 902 F.2d 417 (5th Cir. 1990) (per curiam), the Court concluded that the plaintiff's allegations of "bruises on [his] anterior

chest wall and right forearm and a hematoma on the right upper eyelid" did not amount to "significant injury", without mention of or comparison to the injuries in Johnson. Similarly, relying on Wise, the court below rejected petitioner Hudson's claims with only passing reference to Johnson, and no comparative analysis.

Finally, the Fifth Circuit has proved itself unable to employ a coherent approach to implementation of "significant injury" analysis. In Huquet, the court stated that the "significant injury" component "[is] to be examined objectively, focusing solely on the injury[.]" 900 F.2d at 841 (emphasis added). The court's treatment of the issue in the decision below, in Wesson v. Oglesby, 910 F.2d at 283, and in Wise v. Carlson, 902 F.2d at 417-18, appears to reflect faithful adherence to

that approach. In stark contrast is the most recent decision on these matters, Oliver v. Collins, wherein the court stated:

> There must in all these cases be a "significant injury." Huquet. But where there is a plausible claim that there was no provocation, and no force or other actions whatever were even apparently called for, and the guards' action was not at all in connection with attempting to carry out any arguable employment function but was rather wholly vindictive and punitive from the inception, then our precedents do not foreclose considering these circumstances in determining whether the resultant injury is "significant."

914 F.2d at 59 (emphasis added; citation omitted).

The foregoing analysis is not intended to criticize the Fifth Circuit, so much as to highlight the virtually inevitable consequences of that court's attempt to accomplish an impossible task. What level of injury will be found to merit the characterization

"significant", for purposes of implementation of the "significant injury" standard, is an inherently comparative, and hence subjective, determination.[4/]

It can hardly be regarded as a coincidence that of the five reported Eighth Amendment excessive force decisions issued by the court since Huquet, three have been reversed specifically on the grounds that the

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4/ That which is "objective" has been defined as "independent of what is personal or private in our apprehension and feelings; of such nature that rational minds agree in holding it real or true or valid." Webster's Third New International Dictionary 1555-56 (Merriam-Webster 1981). It is facially untenable to suggest that all, or even most, "rational minds" would agree that the bruised face, split lip, and broken dental plate suffered by petitioner as a result of his beating by respondents do not constitute "significant" injuries. This simple observation is sufficient in itself to undermine the Fifth Circuit's proposition that a "significant injury" standard is susceptible to application on an "objective" basis.

appellate panel unanimously disagreed with the district court's determination that the respective prisoners' alleged injuries were not "significant" for Eighth Amendment purposes. See Oliver v. Collins, 914 F.2d at 60; Williams v. Luna, 909 F.2d at 124; Adams v. Hansen, 902 F.2d at 193-94. Such disagreements between equally intelligent, fair-minded and conscientious jurists, with regard to an issue such as this, can properly be regarded as a foregone conclusion.

For this very reason, the Fifth Circuit's attempts to employ the "significant injury" standard as a substantive device facilitating early dismissal of large numbers of pro se prisoners' excess force complaints -- even assuming that were a permissible objective -- is doomed to fail. Such a standard merely changes the battleground; it cannot win the war. Thus, as Justice

Stevens cogently observed, albeit in a different context:

> Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this "is another instance of judicial haste which in the long run makes waste."

Estelle v. Gamble, 429 U.S. at 113 (Stevens, J., dissenting) (quoting Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (Clark, J.)). There will be no fewer pro se filings made, and no fewer appeals taken, as a result of adoption of the "significant injury" standard.[5/] The inability of that standard, in practical application, to

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5/ See also Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 512-14 & nn.13,18 (1982) (Marshall, J., for the majority) (declining to impose exhaustion of state remedies obligation as prerequisite to institution of Section 1983 claim in light of concerns that exhaustion procedure "would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts").

serve the objectives for which it was developed, is further reason for its rejection by this Court.

CONCLUSION

for all of the foregoing reasons, as well as for the reasons stated in the Opening Brief of Petitioner, this Court should reverse the judgment entered by the court below and reinstate the district court judgment and award of damages in favor of petitioner.

Respectfully submitted,

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